HOW MUCH IS "SUBSTANTIAL EVIDENCE" AND HOW BIG IS A "SIGNIFICANT GAP"?: THE TELECOMMUNICATIONS ATTORNEY FULL EMPLOYMENT ACT

Susan Lorde Martin
Frank G. Zarb School of Business
Hofstra University
Hempstead, NY

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Introduction

The late U.S. Supreme Court Justice Antonin Scalia described the Telecommunications Act of 1996 (Act)[1] as "a model of ambiguity or indeed even self-contradiction."[2] Legal wags have also described the Act as the Telecommunications Attorney Full Employment Act.[3] Twenty years after the Act became law, it is still being interpreted by courts all over the country, including the U.S. Supreme Court, and costing taxpayers millions of dollars as local governments defend their telecom decisions in lawsuits.[4]

One might think that after twenty years of litigation, local governments would know which telecommunications facilities have to be approved under federal law and, if they are not going to approve an application to construct a facility, how to do it in a way that is sustainable by a court. But it is understandable that local governments are inadequate to the task. Generally, they are made up of lay people when it comes to telecommunications issues, with very limited resources,[5] going against very well-financed, very experienced professionals in the telecommunications industry.[6] Thus, the best case is being made on one side of disputes and, often, a poor case on the

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[1] 47 U.S.C. § 332 (2006).

[2] AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366, 397 (1999). Seth P. Waxman, a solicitor general in the Bill Clinton administration, described the Act as "the single most poorly drafted statute enacted by Congress. . . .There is no plain language in that statute." Stephen Labaton, *Slew of Supreme Court Cases to Focus on '96 Telecom Law*, N.Y. TIMES, Oct. 1, 2001 (Business Day - Technology), www.nytimes.com/2001/10/01/technology/01TELE.html?pagewanted=all.

[3] Cybertelecom, *Telecommunications Act of 1996* (2006), www.cybertelecom.org/notes/telecomact.htm; Susan C. Norton, Defining Social Policy: Should Telecommunications Regulation Be Devolved to the States 20 n. 28 (2009), *available from* UMI Microform 1461501, Proquest LLC, Ann Arbor, MI; Adam Thierer, *Will the FCC's Nat'l Broadband Plan Be "Full Employment for Lawyers"?* Technology Liberation Front, Feb. 24, 2010, https://techliberation.com/2010/02/24/will-the-fccs-natl-broadband-plan-be-full-employment-for-lawyers/ (noting FCC Chairman's Chief of Staff's remark that "FCC is doing everything it can to provide full employment for telecom lawyers").

[4] *See, e.g.*, Benjamin L. Meersman, *Note, You Can't Hear Me Now: The Ambiguous Language of the Telecommunications Act of 1996's Tower Siting Provision*, 39 J. CORP. L. 437 (2014); Dina Neda Rezvani, *Can You Hear Me Now? The Race to Provide America with Universal, High-Speed Wireless Coverage*, 9 WASH. J. L. TECH. & ARTS 115 (2013); Harold Furchgott-Roth & Arielle Roth, *Answering Four Questions on the Anniversary of the Telecommunications Act of 1996*, 68 FED. COMM. L.J. 83, 83 (2015-16) (noting Act's enactment on Feb. 8, 1996 and its "deeply contentious" legacy).

[5] *See, e.g.*, Nat'l Tower, LLC v. Plainville Zoning Bd., 297 F.3d 14, 20 (1st Cir. 2002) (noting that "local authorities are frequently lay member boards without many resources"); Second Generation Props., LP v. Town of Pelham, 313 F.3d 620, 629 (1st Cir. 2002) ("[l]ocal zoning boards are lay citizen boards").

[6] *See, e.g.*, MetroPCS New York, LLC v. Village of East Hills, 764 F. Supp. 2d 441, 4445-46 (E.D.N.Y. 2011) (village zoning board claiming it was not familiar with telecom applications and technical jargon and hiring one unlicensed and uncertified "expert" opposing telecom company's several experts). *See also* New York SMSA L't'd P'ship v. Village of Floral Park, 812 F. Supp. 2d 143, 150 (E.D.N.Y. 2011) (Verizon presenting testimony of eight expert witnesses and thirteen sworn affidavits, technical reports and exhibits; Village of Floral Park presenting no experts, letters from fifteen residents, and testimony of ten residents which included statements of opposition based on, *inter alia*, health concerns (impermissible under the Act)). Local governments may not regulate the siting of cell phone

side of local residents and taxpayers. One could argue that the purpose of the Act is facilitated by this arrangement. The Act describes its purpose as "encourag[ing] the rapid deployment of new telecommunication technologies"[7] and, therefore, the Act does not allow state or local governments to effectively "prohibit the ability of any entity to provide any interstate or intrastate telecommunications service."[8] On the other hand, at a time when the "little guy" on "Main Street" feels disenfranchised by the power of "Big Business," this arrangement can seem very unfair (even though the "little guys" want seamless cell phone service).[9]

This article focuses on two of the Act's limitations on local governments when they want to deny a request to construct a cell phone tower. The Act requires such a denial to be "supported by substantial evidence contained in a written record."[10] On its face it sounds simple, but as a practical matter it must be hard to know what support is required. The U.S. Supreme Court was still explaining the language in 2015,[11] and other courts continue to explain it to this day.[12] Similarly, although courts have accepted that a denial preventing a telecommunications company from closing a "significant gap" in cell phone service is equivalent to prohibiting the provision of cell phone service,[13] it is still unclear what constitutes a significant gap.

This article starts with a brief background of the Act and then discusses the "substantial evidence" language: methods of providing substantial evidence, and courts' interpretations of how much evidence and what kind of evidence is substantial. The article discusses the different ways courts have determined whether significant gaps in cell phone service exist and are the equivalent of a prohibition of the provision of cell phone service. The article concludes that twenty years of experience should be sufficient to stem the tide of resources wasted on litigating the legality of local decisions on cell phone tower siting. Because that is obviously not the case, Congress should amend the Act to reflect a telecommunications landscape that is very different from the one that existed when Congress originally passed the Act in 1996. Congress should direct the FCC to issue rules that clarify the contentious issues and provide guidelines to local government entities so they

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facilities on the basis of environmental effects of radio frequency emissions (including concerns about health) if the facilities are in compliance with FCC regulations. 47 U.S.C. § 332(c)(7)(B)(iv) (1996).

[7]Telecommunications Act of 1996, Pub. L. No. 104-104, pmbl., 110 Stat.56.

[8]47 U.S.C. § 253(a).

[9]*See, e.g.*, Andrew Dys, *Clover Zoning Board Denies Controversial Cell Tower*, THE HERALD (Clover, SC), May 26, 2016, www.heraldonline.com/news/local/news-columns-blogs/andrew-dys/article80216227.html (owner of home across street from proposed tower: "The little guy won. . . . [T]ower companies choose poor neighborhoods for towers . . . where people have no voice or money to fight back."); Peter McGuire, *Benton Cell Tower Sparks Outrage from Residents*, MORNING SENTINEL (Waterville, Maine), Aug. 12, 2015, 2015 WLNR 23814832 (owner of home adjacent to proposed cell tower: "Somebody has to stand up for the little guy."); Katy Macek, *New Cell Site Frustrates Residents, Officials*, CHIPPEWA HERALD (Chippewa Falls, WI), Apr. 28, 2016, 2016 WLNR 12918409 (concerned neighbor: "cell phone company seems to have a lot of say, maybe even more than a community and its elected officials").

[10]47 U.S.C. § 332(c)(7)(B)(iii).

[11]T-Mobile South, LLC v. City of Roswell, 135 S. Ct. 808 (2015).

[12]*See, e.g.*, Global Tower Assets, LLC v. Town of Rome, 810 F.3d 77 (1st Cir. 2016) (cell tower in Maine); Stout & Co. v. City of Bel Aire, No. 2:15-cv-09323-JTM, 2016 WL 3759440 (D. Kan. July 14, 2016) (cell tower in Kansas); Cellular South Real Estate, Inc. v. City of Mobile, No. 15-00387-CG-B, 2016 WL 3746661 (S.D. Ala. July 8, 2016) (cell tower in Alabama); Nextel Comm. of the Mid-Atlantic, Inc. v. Zoning Hearing Bd., No. 3:14-CV-2409, 2016 WL 1271385 (M.D. Pa. Mar. 31, 2016) (cell tower in Pennsylvania).

[13]*See, e.g.*, Cellular Tel. Co. v. Zoning Bd., 197 F.3d 64, 70 (3d Cir. 1999) ("local zoning policies and decisions have the effect of prohibiting wireless communication services if they result in 'significant gaps' in the availability of wireless services").

know how to make decisions that follow the rules and courts would support, and to telecommunications companies encouraging them to consult with local residents and make a more concerted effort to install the least intrusive facilities. All stakeholders should recognize that alternative conflict resolution techniques initiated when a tower project is first considered could eliminate costly litigation and benefit all stakeholders.

I. The Telecommunications Act of 1996

In 1990 there were fewer than 6 million mobile cellular subscriptions in the United States.[14] By 2000, there were well over 100 million, and by 2014 that number had more than tripled.[15] By 2016 U.S. consumers were looking at their mobile devices more than 8 billion times a day.[16] To service these consumers, there are well over 600 thousand cell phone towers in the United States.[17]

When President Clinton signed the 1996 Act, it was the first major change in telecommunications law in over sixty years.[18] The Act's specific purpose was to encourage telecommunications providers by creating a less regulated environment and to promote competition among them so that consumers throughout the country would have better, faster, and cheaper access to telecommunications services.[19] To effect those goals, the Act puts limitations on the way that states and local governments may regulate telecommunications facilities but attempts not to preempt local regulation entirely. States and local governments may still regulate "the placement, construction, and modification" of telecommunications facilities,[20] but they may not "unreasonably discriminate among providers" or "prohibit or have the effect of prohibiting the provision of personal wireless services."[21] When they receive a request to construct such facilities, they must respond "within a reasonable period of time"[22] and must support any denial with "substantial evidence contained in a written record."[23] Any provider may, within thirty days of a denial or failure to respond, commence a legal action, and courts are directed to decide these cases "on an expedited basis."[24]

Within seven months of its enactment, courts in all areas of the country had decided cases about the legality under the Act of local governments' denying applications or refusing to act on

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[14]Trading Economics, *Telecommunications Revenue (% GDP) in the United States*, www.tradingeconomics.com/united-states/telecommunications-revenue-percent-gdp-wb-data.htm (last visited July 15, 2016 2:32 P.M.).

[15]*Id.*

[16]Deloitte, *Telecommunications Industry Outlook*, www2.deloitte.com/us/en/pages/technology-media-and-telecommunications/articles/telecommunications-industry-outlook.htm/ (interview with Craig Wigginton, vice chairman & U.S. telecommunications leader, Deloitte & Touche) (last visited July 15, 2016).

[17]*Welcome to AntennaSearch.com!*, www.antennasearch.com (July 17, 2016) (listing 610,671 towers in United States including 1,540 added in prior week).

[18]Cybertelecom, *supra* note 3 .

[19]Pub. L. No. 104-104, 110 Stat. At 56 (1996); 141 CONG. REC. H8269 (daily ed. Aug. 2, 1995) (statement of Rep. Linder).

[20]47 U.S.C. § 332(c)(7)(A) (1996).

[21]47 U.S.C. § 332(c)(7)(B(i)(I) & (II) 1996.

[22]Declaratory Ruling to Clarify Provisions of Sec. 332(C)(7)(B), 24 FCC Rcd. 13994, 14012 (2009) (FCC finding 90 days to be reasonable time to process collocation applications and 150 days to be reasonable time to process other applications).

[23]47 U.S.C. § 332(c)(7)(B)(ii) & (iii) (1996).

[24]47 U.S.C. § 332(c)(7)(B)(v) (1996).

applications for the siting of cell phone towers.[25] Telecom companies, eager to beat the competition for the provision of cell phone service, were on one side of the litigation, while local governments, pressured by constituents to keep cell phone towers away from their properties, were on the other. Twenty years after passage of the Act the confrontational and litigious situation has changed little with all sides sharing blame for that. Congress has not amended the Act to clarify the ambiguous terms that are the focus of lawsuits; the FCC has not issued sufficient rules that would help local governments make legal decisions about tower sitings;[26] telecom companies have not paid enough attention to the concerns of local residents; and local governments have not taken some fairly obvious, and not necessarily expensive, actions that would make them more successful in justifying to a court their denial of applications to construct cell phone towers. Two of the most frequently adjudicated issues are whether the governing body's decision to deny an application to construct a cell tower was based on substantial evidence, and whether the telecom company is providing a cure for a significant gap in its cell phone service without which it would effectively be prohibited from supplying cell phone service.

II. The Litigation

A. Substantial Evidence

Courts have noted that the substantial evidence requirement "preserves the decision-making authority of local zoning boards, 'while protecting wireless service providers from unsupported decisions that stymie the expansion of telecommunication technology.'"[27] This is a worthy purpose; however, as a practical matter, the requirement costs a great deal to taxpayers and cell phone users in litigation costs because its meaning is so unclear even after twenty years of adjudication. As recently as 2015, the United States Supreme Court discussed the term "substantial evidence" as it was used by Congress in the Act.[28] The Court said that the phrase is a term of art requiring an administrative agency to disclose clearly the reasons for its decisions so that a reviewing court would be able to judge the decisions.[29] The Court stressed that the reasons do not have to "be elaborate or even sophisticated," just "clear enough to enable judicial review."[30] Those statements did not answer the questions, what kind of evidence is "substantial" and how much evidence is "substantial." So the opinion was not helpful in resolving an issue that is central to many cases. Determining whether substantial evidence supports a denial of a permit to construct telecom facilities remains a "fact-intensive inquiry."[31]

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[25]BellSouth Mobility, Inc. v. Gwinnett County, 944 F. Supp. 923 (N.D. Ga. 1996); Sprint Spectrum v. City of Medina, 924 F. Supp. 1036 (W.D. Wash. 1996); Crown Commc'ns v. Zoning Hearing Bd., 679 A.2d 271 (Pa. Commw. Ct. 1996); Westel-Milwaukee Co. v. Walworth County, 556 N.W.2d 107 (Wis. Ct. App. 1996);

[26]In 2009 the FCC did issue a Declaratory Ruling that addressed some siting issues but, given the number of cases that have been litigated between then and now, it is clearly not sufficient. FCC Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, 24 F.C.C.R. 13994 (Nov. 18, 2009).

[27]Indus. Tower & Wireless, LLC v. Haddad, 109 F. Supp. 3d 284, 296 (D. Mass. 2015) (citing ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1st Cir. 2002).

[28]T-Mobile South, LLC v. City of Roswell, 135 S. Ct. 808, 815 (2015).

[29]*Id.*

[30]*Id.* For a discussion of "reason-giving requirements" see Donald J. Kochan, *Constituencies and Contemporaneousness in Reason-Giving: Thoughts and Direction after T-Mobile*, 37 CARDOZO L. REV. 1 (2015).

[31]T-Mobile Northeast LLC v. City Council, 674 F.3d 380, 387 (4th Cir. 2012) (Newport News, Virginia).

1. Defining Substantial Evidence

Six months after the 1996 Act became law, the United States District Court for the Northern District of Georgia decided that the Gwinnett County Board of Commissioners violated the "substantial evidence" requirement in the Act when the Board denied BellSouth's application to erect a 197-monopole to improve the quality of its cell phone service.[32] The court reasoned that substantial evidence means "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"[33] BellSouth submitted "numerous" documents supporting its application including a report by the Airspace Safety Analysis Corporation (ASAC) indicating that the monopole presented no air space risk; a memorandum from the Gwinnett County Airport Authority agreeing with the ASAC; supporting memoranda from the Gwinnett County departments of transportation, public safety, and planning and development.[34] Gwinnett County residents of two subdivisions, on the other hand, were represented by one resident who spoke for the allotted five minutes at a County hearing.[35] The resident raised concerns about children's safety, potential damage in storms, aesthetic incompatibility with existing structures, and decreased property values.[36] The court concluded that it could not "conscientiously find that the evidence supporting the board's decision to deny plaintiffs' a tall structure permit is substantial."[37]

This twenty-year-old decision raised two issues. First, there is nothing in the Act that requires a balancing of evidence to determine whose evidence is more substantial, merely that a denial of a request to construct a telecom facility is supported by substantial evidence.[38] In 2003, the Fourth Circuit concluded that the Act does not require a comparative test, but only that the denial of an application to construct a tower is supported by substantial evidence.[39] A comparative approach would set a stricter standard than the Act requires.[40]

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[32]BellSouth Mobility, Inc. v. Gwinnett County, 944 F. Supp. 923, 924, 928 (N.D. Ga. 1996). *See also* Judicial Prac. Comm. of the Fed. Commc'ns Bar Ass'n, *Communications Law: Annual Review: T-Mobile South, LLC v. City of Roswell, Georgia No. 13-975 (U.S. Jan. 14, 2015)*, 67 FED. COMM. L.J. 377 (2015) (explaining Court decision).

[33]*Id.* at 928 (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1952)). "Substantial evidence" has also been defined as "more than a mere scintilla but less than a preponderance." Michael Linet, Inc. v. Village of Wellington, 408 F.3d 757, 762 (11th Cir. 2005).

[34]*BellSouth*, 944 F. Supp. at 928.

[35]*Id.* at 926.

[36]*Id.*

[37]*Id.* at 928.

[38]It should be noted that in an entirely different context, the U.S. Supreme Court mentioned that its "phrasing . . . readily lent itself to the notion" that evidence supporting an administrative decision could be considered "'substantial' when considered by itself," Universal Camera Corp. v. NLRB, 340 U.S. 474, 478 (1951), however, the Court concluded that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 488. There is nothing in the Telecommunications Act of 1996 that requires a denial of an application to construct a cell phone tower to be supported by an entire record of evidence, only by "substantial evidence." The interpretation of those words is problematic. *See, e.g.*, J.I.B., *Symposium: Constitutional Substantial-Evidence Review? Lessons from the Supreme Court's Turner Broadcasting Decisions*, 97 COLUM. L. REV. 1162 (1997) (concluding that Court's approach to constitutional substantial-evidence is "vague and confused").

[39]USCOC of Virginia RSA #3, Inc. v. Montgomery Cty. Bd. of Supervisors, 343 F.3d 262, 270 (4th Cir. 2003).

[40]*Id.*

Secondly, after giving a definition of "substantial evidence," the *Gwinnett* court assumed, without discussion, that at least four concerns raised by residents were not more than a scintilla of evidence, and no reasonable mind could accept those concerns as relevant evidence supporting the denial of the application to erect a monopole that would be visible from the front windows of at least twenty residents.[41] The implication is that only reports by experts can be considered substantial evidence and common concerns of residents are weightless. These issues remained for several years as the *Gwinnett* case became a model that courts all over the country followed.[42] But not all courts were persuaded that residents' objections were not substantial. Two years later the Fourth Circuit explained that a substantial evidence standard created for administrative decisions should be different from one meant for legislative decisions.[43] It is appropriate that "a legislature and its members will consider the views of their constituents to be particularly compelling forms of evidence, in zoning as in all other legislative matters. . . .often trump[ing] those of bureaucrats or experts."[44]

In 2002, the United States Court of Appeals for the Second Circuit opined that when courts evaluate a tower permit denial under the Act, they must view the record in its entirety including evidence that does not support the local government's decision.[45] The court noted that in New York

aesthetics can be a valid ground for local zoning decisions, but that under the Act, there must be "more that a mere scintilla" of evidence of the negative visual impact of the tower to be considered substantial evidence that serves as the basis for a permit denial.[46] The court held that the more-than-a-scintilla standard was not satisfied by a few generalized expressions of concern with aesthetics.[47] Similarly, the court concluded that residents' generalized expressions of fear of declining property values also did not meet the substantial evidence standard to support a denial of a tower permit.[48] The court recognized the difficulty in evaluating the substantiality of residents' concerns about aesthetics and property values when they are opposed by expert testimony provided by telecommunications companies; however, in this case the evaluation was complicated by the residents' emphasis on health concerns, an argument that the Act does not permit as a basis for denying a permit.[49] Residents and the local Town of Oyster Bay government, being lay people, obviously did not recognize that they were undermining their own position by emphasizing their fears that a cell phone tower had health risks.[50] Perhaps the court might have

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[41]*BellSouth*, 944 F. Supp. at 926.

[42]*See, e.g.*, Illinois RSA No. 3, Inc. v. County of Peoria, 963 F. Supp. 732 (C.D. Ill. 1997); Western PCS II Corp. v. Extraterritorial Zoning Auth., 957 F. Supp. 1230 (D. N.M. 1997) (Santa Fe).

[43]AT&T Wireless PCS, Inc. v. City Council, 155 F.3d 423, 430 (4th Cir. 1998).

[44]*Id.*

[45]Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 494 (2d Cir. 2002).

[46]*Id.* at 495.

[47]*Id.* at 496.

[48]*Id.*

[49]*Id.* The Act prohibits the denial of a permit to erect a telecommunications facility on the basis of health or environmental concerns if the facility meets FCC standards. 47 U.S.C. 332(c)(7)(B)(iv) (1996).

[50]Lay people, and often their elected representatives, twenty years after the Act's passage, continue to undermine their legal position in denying applications to construct cell phone towers, by emphasizing that their objections are primarily based on fears of health risks. *See, e.g.*, Deon J. Hampton, *Ronkonkoma T-Mobile Cell Tower to Be Built despite Concerns*, NEWSDAY (Long Island, NY), Jan. 17, 2016, *available at* http://www.newsday.com/long-island/suffolk/ronkonkoma-t-mobile-cell-tower-to-be-built-despite-concerns-1.11333828 (residents near site fear

been persuaded by arguments about aesthetics and property values had they not seemed secondary to impermissible health arguments.

Also in 2002, the Eleventh Circuit agreed that the Act does not define "substantial evidence," and, therefore, Congress must have meant the phrase to have its usual "scintilla/reasonable minds" definition.[51] The court went on to say that aesthetic concerns could be the basis for denial of a tower permit, but there had to be substantial evidence and in the case before the court, there was no substantial evidence.[52] County residents undermined their position by presenting petitions that contained no reasons why petitioners signed and no evidence of the visual impact of the tower. This case is another example of residents and local government not understanding how to mount a case under the Act.

On the other hand, the United States Court of Appeals for the Eighth Circuit deciding a case about an eighty-five foot tower in Des Moines, Iowa, concluded that the denial of the exception and variance needed for the construction was based on substantial evidence even though there was no expert testimony.[53] The substantial evidence consisted of residents' testimony that ice could form on the tower and damage cars in the parking lot below; the tower would be seen from the windows on one side of the building diminishing residents' enjoyment of their property; and the proximity of the tower would lower their property values.[54] The court said that it was common sense that ice would form on cell towers in Des Moines in winter, that owners' complaints about not enjoying their property if their views were of the tower were not merely "nebulous aesthetic concerns," and that it was common sense that such views would reduce property values.[55] The First Circuit also concluded that because local zoning boards are made up of lay citizens, they do not have to make extensive factual findings to support a decision to deny an application to construct a cell phone tower.[56] The foregoing opinions suggest that litigation outcomes are currently so fact and court sensitive that it is important to create articulated standards that could be replicated and met in cases across the country.

By 2011, local residents in some locations had become more sophisticated in presenting their cases against a tower siting. The United States District Court for the Middle District of Florida affirmed Manatee County's denial of a permit to build a 150-foot tower within a residential golf-course community.[57] The court cited the Eleventh Circuit's opinion that aesthetic concerns could be the basis for a permit denial.[58] In addition to residents' testimony at a hearing, they presented slide shows, maps, graphs, a photo simulation, and a video presentation.[59] Residents also presented academic articles about a tower's negative impact on property values, and a

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tower will affect health); *WeHo Planning Commission Rejects Verizon Wireless Request to Install Cell Antenna*, ICT MONITOR WORLDWIDE, Dec. 4, 2015, *at* 2015 WLNR 35955535 (West Hollywood, CA).

[51]Preferred Sites, LLC v. Troup Cty., 296 F.3d 1210, 1218 (11th Cir. 2002).

[52]*Id.* at 1219-20.

[53]USCOC of Greater Iowa, Inc. v. Zoning Bd., 465 F.3d 817, 823 (8th Cir. 2006).

[54]*Id.*

[55]*Id.*

[56]Second Generation Prop., L.P. v. Town of Pelham, 313 F.3d 620, 629 (1st Cir. 2002).

[57]Vertex Dev., LLC v. Manatee Cty., 761 F. Supp. 2d 1348, 1371 (M.D. Fla. 2011).

[58]*Id.* at 1362.

[59]*Id.* at 1361.

financial planner and two realtors testified about that.[60] The court concluded that this record constituted substantial evidence on which to base a permit denial.[61]

2. Aesthetics

Often, over the years, a court's affirmation of a local government's denial of a permit to construct a cell tower depended on whether or not the government's decision was based on substantial evidence of specific aesthetic problems that would be created by the tower. However, even with twenty years of experience, what that means is still unclear. In 2016 the United States District Court for the Southern District of Alabama undertook a review of all Eleventh Circuit district court cases about towers and aesthetics and concluded that there is very little consistency and "no bright line rule to determine whether a given amount of aesthetic evidence is enough to support a finding of substantial evidence."[62] Nevertheless, two Eleventh Circuit tower siting cases decided in 2002 within two weeks of each other, suggest the kinds of facts that will predispose a court to decide in favor of either the telecom company or the local government denying the tower permit.[63]

In *Preferred Sites, LLC v. Troup County*,[64] the telecom company applied to construct a 250-foot tower.[65] At a hearing on the application the county zoning administrator submitted an affidavit stating that several local residents told him they opposed the tower presumably because it was visually obtrusive, but there were no specific objections.[66] Five petitions opposing the tower were submitted but some of them were missing information and none contained any specific objections.[67] Immediately after the hearing, the county board voted to deny the construction application.[68] The Eleventh Circuit acknowledged that aesthetic values were a legitimate local concern,[69] but affirmed the district court's order to the county to approve the tower application[70] because "citizens' generalized concerns about aesthetics are insufficient to constitute substantial evidence upon which the [b]oard could rely."[71]

Just two weeks earlier in *American Tower LP v. City of Huntsville*,[72] the Eleventh Circuit reversed the district court and decided in favor of the local zoning board, holding that the board's decision to deny the application to construct a cell tower was supported by substantial evidence.[73] In this case, the board heard testimony from a local realtor who said that once people in the neighborhood knew about the proposed tower it became harder to sell neighborhood houses,

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[60] *Id.* at 1366-67.

[61] *Id.* at 1370-71.

[62] Cellular South Real Estate, In. v. City of Mobile, No. 15-00387-CG-B, 2016 WL 3746661, at *7 (S.D. Ala. July 8, 2016).

[63] Preferred Sites, LLC v. Troup Cty, 296 F.3d 1210 (11th Cir. 2002); American Tower LP v. City of Huntsville, 295 F.3d 1203 (11th Cir. 2002).

[64] *Preferred Sites*, 296 F.3d at 1212.

[65] *Id*. at 1213.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 1214.

[69] *Id.*

[70] *Id.* at 1222.

[71] *Id.* at 1219.

[72] 295 F.3d 1203 (11th Cir. 2002).

[73] *Id.* at 1208.

devaluing homes and harming the area.[74] She testified that she lost potential buyers for her own property because of the tower.[75] The board also heard testimony from other residents about the tower's negative aesthetic impact and its unusual proximity to schools and soccer fields.[76] The facts of these two cases are not dramatically different, but the cases indicate the importance of evidence that particularizes the negative aesthetic impact of a cell tower in order to be considered substantial and, therefore, sufficient to support a denial of permission to construct a tower.

In *T-Mobile USA Inc. v. City of Anacortes*,[77] T-Mobile applied to the City of Anacortes for a special permit to erect a 116-foot monopole for cell phone service.[78] Some residents claimed that the monopole would not be fully screened and so it would have a negative effect on the neighborhood and their views.[79] The city denied the application on that basis.[80] The Ninth Circuit concluded that the denial was based on "'more than a scintilla of evidence'" and, therefore, constituted substantial evidence sufficient to support the denial under the Act.[81] A significant factor was that the Anacortes Municipal Code provided that the problems mentioned by the residents were issues that could be considered in decisions about special use permits.[82]

3. Relevance of Local Zoning Codes

One of the more important criteria that has developed for determining whether the substantial evidence standard has been met when a local government denies a tower siting permit, is the local government's consideration of the requirements of local zoning ordinances.[83] The First, Second, Third, Fourth, Sixth, Seventh, and Ninth Circuits have acknowledged that the Act "itself does not provide the legal basis to deny an application to construct a personal wireless facility;" that authority must be found in state or local law."[84] The Fourth Circuit has been consistent in holding that the failure to comply with local zoning regulations is a significant factor in justifying the denial of an application for a cell phone tower,[85] and under some circumstances may even be sufficient by itself.[86]

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[74]*Id.*

[75]*Id.*

[76]*Id.*

[77]572 F.3d 987 (9th Cir. 2009).

[78]*Id.* at 988.

[79]*Id.* at 994-94.

[80]*Id.* at 989-90.

[81]*Id.* at 995.

[82]*Id.* at 994.

[83]PI Telecom Infrastructure, LLC v. City of Jacksonville, 104 F. Supp. 3d 1321, 1342 (M.D. Fla. 2015) (citing federal district court decisions from 2009 and 2010); Vertex Dev., LLC v. Manatee Cty., 761 F. Supp. 2d 1348, 1364 (M.D. Fla. 2011) (noting Act permits local government to apply standards in local zoning codes).

[84]Sprint Spectrum L.P. v. Willoth, 176 F.3d 630, 644 (2d Cir. 1999); Sprint Spectrum, L.P. v. Zoning Bd., 606 Fed. Appx. 669, 672 (3d Cir. 2015) (quoting *Willoth*); Metropcs, Inc. v. City & Cty. of San Francisco, 400 F.3d 715, 723-24 (9th Cir. 2005); S.W. Bell Mobile Sys., Inc.v. Todd, 244 F.3d 51 (1st Cir. 2001); VoiceStream Minneapolis, Inc. v. St. Croix Cty., 342 F.3d 818, 830 (7th Cir. 2003); T-Mobile Northeast LLC v. City Council, 674 F.3d 380, 387 (4th Cir. 2012) (Newport News, Virginia); T-Mobile Cent. LC v. Charter Twp., 691 F.3d 794, 798-99 (6th Cir. 2012).

[85]360º Commc'ns Co. v. Bd. of Supervisors, 211 F.3d 79 (4th Cir. 2000); USCOC of Va. RSA #3, Inc. v. Montgomery Cty. Bd. of Supervisors, 343 F.3d 262, 271 (4th Cir. 2003).

[86]*Montgomery Cty.*, 343 F.3d at 371.

The Eighth Circuit has said that the Act has not displaced local zoning law when it comes to cell towers because the Act does not contain any substantive law about granting or denying permits for cell towers.[87] Thus, substantial evidence of aesthetic harmony[88] or the views in a public park,[89] goals contained in local zoning codes, can be grounds for denying a variance for a cell tower. In cases in which those two issues were grounds for the denial of variances to erect cell phone towers, the United States District Court for the Middle District of Florida accepted as substantial evidence combinations of academic articles, photographs, and testimony by real estate professionals.[90]

The San Francisco Planning Code says that the city may take into consideration "community need" in deciding whether or not to approve applications for conditional uses which include cell phone facilities.[91] When a telecom company applied for a permit to erect six antennas fifty-three feet above the sidewalk in the Richmond neighborhood, the City Zoning Board denied the application on the grounds that the Richmond neighborhood did not need additional telecom facilities.[92] The Ninth Circuit concluded the Board's denial was supported by substantial evidence because even the applicant's representatives testified that five other telecom providers had antennas in the same neighborhood providing excellent coverage.[93] In addition local residents provided testimony, petitions, and site maps all indicating excellent wireless coverage.[94]

The Sixth Circuit also looked at the local Zoning Code in Saginaw, Michigan to determine whether the Saginaw Zoning Board supported with substantial evidence its denial of a variance for a telecom company to construct a 150-foot cell tower.[95] The court dismissed all three reasons for the denial: the aesthetics concern was based on merely a few mentions and no discussion at meetings; the health concern was not permitted by the Act; and offering an alternative construction site was not based on any criteria in the Zoning Code for granting a variance.[96] The court concluded that a denial of a variance cannot be based on substantial evidence if the grounds for the denial are not related to criteria in the zoning code.[97]

About twenty years after the Act became law, there are still cases about denials of variances for towers but local governments and local residents have become more sophisticated in presenting evidence that courts may consider substantial, particularly by connecting their objections to local zoning codes. For example, in 2015 the Quorum Court of Washington County, Arkansas denied an application for construction of a 300-foot cell phone tower on property zoned agricultural.[98] Residents in surrounding neighborhoods, using pictures and simulations, objected to the tower on the basis of safety issues in the event of tornadoes and other weather incidents, and the impact on residents' views and property values, and they related their objections to a specific section in the

[87]USCOC of Greater Iowa, Inc. v. Zoning Bd., 465 F.3d 817, 822 (8th Cir. 2006).

[88]*Vertex*, 761 F. Supp. 2d at 1365.

[89]PI Telecom Infrastructure, LLC v. City of Jacksonville, 104 F. Supp. 3d 1321, 1344 (M.D. Fla. 2015).

[90]*Vertex*, 761 F. Supp. 2d at 1366; *PI Telecom Infrastructure*, 104 F. Supp. 3d at 1350.

[91]MetroPCS, Inc. v. City & Cty. of San Francisco, 400 F.3d 715, 725 (9th Cir. 2005).

[92]*Id.* at 718, 725.

[93]*Id.* at 726.

[94]*Id.*

[95]New Par v. City of Saginaw, 301 F.3d 390, 392, 396 (6th Cir. 2002).

[96]*Id.* at 398.

[97]*Id.*

[98]Smith Commc'ns, LLC v. Washington Cty., 785 F.3d 1253, 1255, 1259 (8th Cir. 2015).

Washington County Zoning Code.[99] The Eighth Circuit agreed that the application denial was supported by substantial evidence.[100]

In 2016 the United States District Court for the District of Kansas held that the Bel Aire City Council's denial of a permit to construct a 170-foot cell tower was supported by substantial evidence.[101] The court noted that the Council's reasons for the denial were "clearly proper considerations" based on the city code and several city zoning regulations.[102] The court also noted that the proposed "galvanized tower" would be five times the height of the homes in the residential neighborhood in which it would be located, and that the Act does not require a city council "to cast aside its common sense."[103]

4. Substantial Evidence in New Jersey

The New Jersey Superior Court Appellate Division has noted that the "substantial evidence" requirement is similar in both the Act and New Jersey's Municipal Land Use Law (MLUL).[104] The court had a case in 2016 that involved an application to erect a cell tower designed as a 120-foot flagpole.[105] The application required the granting of a variance, and under New Jersey law, the applicant must provide proof of positive criteria, that is, "special reasons" for the variance, and negative criteria, that is, "the variance 'can be granted without substantial detriment to the public good and that it will not substantially impair the intent and the purpose of the zone plan and zoning ordinance."[106] The court then applied the "*Sica* balancing test" which was fashioned by the New Jersey Supreme Court for a variance case it decided before the Act became law and which had nothing to do with telecom facilities.[107] Although New Jersey law did not explicitly require a balancing test, the *Sica* court noted that "'just because an institution [or facility] is thought to be a good thing for the community is no reason to exempt it completely from restrictions designed to alleviate any baneful physical impact it may nonetheless exert in the interest of another aspect of the public good equally worthy of protection.'"[108] The *Sica* court then provided a general guide for balancing positive and negative criteria when deciding whether to grant a variance.[109]

First, the local agency should identify the public interest and decide how compelling the proposed use is in satisfying the public interest.[110] Second, the local agency should identify the detrimental effect of granting the variance, recognizing that a minimal detrimental effect may not

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[99]*Id.* at 1255-56, 1259. The Eighth Circuit noted in its opinion that a member of the Quorum Court stated he "would not buy property in the area with the 300-foot tower so close." *Id.* at 1259.

[100]*Id.* at 1259-60.

[101]Stout & Co. v. City of Bel Aire, No. 2:15-cv-09323-JTM, 2016 WL 3759440, at *1 (D. Kan. July 14, 2016)

[102]*Id.* at *9.

[103]*Id.*

[104]T-Mobile Northeast, LLC v. Borough of Mendham Zoning Bd., 2015 WL 10091529 (N.J. Super. Ct. App. Div. Feb. 16, 2016).

[105]*Id.* at *1.

[106]*Id.* at *2 (citing Sica v. Bd. of Adjustment, 603 A.2d 30 (N.J. 1992).

[107]*Id.* at *3. The *Sica* case was about the denial of a variance application for the construction of a residential facility for rehabilitation of head trauma victims in a residential zone. 603 A.2d at 32.

[108]*Sica*, 603 A.2d at 35 (quoting concurring opinion in Roman Catholic Diocese v. Borough of Ho-Ho-Kus, 220 A.2d 97, 102 (N.J. 1966)).

[109]*Id.* at 37.

[110]*Id.*

outweigh a beneficial use.[111] Third, the local agency may reduce the impact of the detrimental effect by requiring conditions be met before the variance is granted.[112] And fourth, the local agency should balance the positive and negative criteria and decide whether granting the variance would be substantially detrimental to the public good.[113]

The 2016 New Jersey appellate court held that when doing a *Sica* balancing, the positive criteria are satisfied if an FCC-licensed carrier provides credible testimony that there is a gap in cell phone coverage.[114] Then the court addressed the negative criteria: first, the local agency has to decide whether granting the variance would "cause such damage to the character of the neighborhood as to constitute 'substantial detriment to the public good.;'" and second, the local agency has to have proof that the proposed use would not "'substantially impair the intent and purpose of the zone plan and zoning ordinance.'"[115]

After setting up these very specific criteria, the court then analyzed the local zoning board's denial of T-Mobile Northeast's application to erect a 120-foot monopole in a shopping center.[116] The court noted the similarity between New Jersey's municipal law and the federal Act in requiring zoning boards to base their decisions on "'substantiated proofs rather than unsupported allegations."[117] The New Jersey appellate court concluded that T-Mobile satisfied the positive criteria and, because there were no findings about the impact of the monopole on adjacent properties or about impairment of the zone plan or ordinance, T-Mobile also satisfied the negative criteria and, therefore, the application for a variance should be granted.[118]

The New Jersey court's detailed approach with specific steps for deciding whether or not to grant a variance for a telecom facility appears much more standardized than basing a decision on whether or not it was supported by substantial evidence. But, the ultimate conclusion relies on the same assessment about the amount and quality of the evidence presented on each side of the controversy. The New Jersey court, while talking about positive and negative criteria, ultimately noted that a local agency cannot base a denial of a variance on only unsupported resident testimony when there is no qualified expert testimony.[119]

5. Substantial Evidence in New York

Because New York law provides that telecom providers are public utilities for the purpose of zoning applications, applications to erect telecom facilities are reviewed under an easier "public necessity" standard.[120] For telecom providers that standard means that the applicant for a zoning permit must show that there are gaps in cell phone service, the proposed facility will eliminate the gaps, and the proposed facility will intrude only minimally on the community.[121] Because of the advantage given to public utilities, if the telecom provider demonstrates those three factors, the

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[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *T-Mobile Northeast*, 2015 WL 10091529, at *3.

[115] *Id.* at *4.

[116] *Id.*at *9-11.

[117] *Id.* at *8.

[118] *Id.* at *11.

[119] *Id.*

[120] T-Mobile Northeast LLC v. Town of Islip, 893 F. Supp. 2d 338, 355 (E.D.N.Y. 2012).

[121] *Id.*

assumption is that there is no substantial evidence to support a denial of the permit.[122] On the other hand, if the absence of just one of those factors is supported by substantial evidence, then a court will not overrule a permit denial by the local government.[123]

Negatively affecting the aesthetics of an area can be grounds for denying a zoning application in New York.[124] Generalized or speculative negative effects will not constitute substantial evidence supporting a denial; instead, there must be objective evidence in the form of photographs, site plans, surveys, or something similar to indicate that residents will be able to see the proposed facility and that there will be "an actual 'negative visual impact on the community.'"[125] It is also important that the local Zoning Code indicates the locality's commitment to protecting residential districts when making decisions about the location of telecom facilities.[126] The Second Circuit, in deciding a case about siting telecom towers in New York, noted the importance of the Act's not requiring local government's to approve all telecom permit applications: denials are incentives for providers to create new technology that improves reception and minimizes towers, satisfying the Act's goal of encouraging innovation.[127]

B. Significant Gap

Even if a local government's denial of an application to erect a telecom facility is supported by substantial evidence, the denial will violate the Act if it prevents closure of significant gaps in cell phone service.[128] Preventing closure of gaps is violative of the Act's requirement that local governments "not prohibit or have the effect of prohibiting the provision of personal wireless services."[129] The problem with this formulation is there is no general rule about what constitutes a significant gap or what is an effective prohibition.[130] So each litigated dispute has to be resolved based on its specific facts and circumstances.[131]

The Third Circuit created a two-prong test for deciding whether an effective prohibition exists.[132] The telecom provider must demonstrate that, first, remote users have a significant gap in cell phone service and are not served by another provider; and, second, the gap will be filled in

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[122]*Id.*

[123]*Id.*

[124]*Id.* at 356 (citing Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 495 (2d Cir. 1999) and Suffolk Outdoor Advert. v. Hulse, 373 N.E.2d 263 (N.Y. 1977)).

[125]*Id.* at 358.

[126]*Id.* at 362.

[127]Sprint Spectrum L.P. v. Willoth, 176 F.3d 630, 640 (2d Cir. 1999).

[128]Green Mountain Realty Corp. v. Leonard, 750 F.3d 30, 38 (1st Cir. 2014).

[129]*Id.* For a discussion of the Act's effective prohibition rule, see Andrew Erber, *Note, The Effective Prohibition Preemption in Modern Wireless Tower Siting*, 66 FED. COMMC'N L.J. 357 (2014); Lucas R. White, *Notes, Untangling the Circuit Splits Regarding Cell Tower Siting Policy and 47 U.S.C. § 332©) (7): When Is a Denial of One Effectively a Prohibition on All?*, 70 WASH. & LEE L. REV. 1981 (2013).

[130]*Green Mountain*, 750 F.3d at 40.

[131]*Id.*; Second Generation Prop., L.P. v. Town of Pelham, 313 F.3d 620, 630 (1st Cir. 2002). For a discussion of the early foundational cases on "significant gap," see Stephanie E. Niehaus, *Notes, Bridging the (Significant) Gap: To What Extent Does the Telecommunications Act of 1996 Contemplate Seamless Service?*, 77 NOTRE DAME L. REV. 641 (2002).

[132]APT Pittsburgh Ltd. P'ship v. Penn Twp., 196 F.3d 469, 480 (3d Cir. 1999); *see also* Nextel West Corp. v. Unity Township, 282 F.3d 257, 265 (3d Cir. 2002) (then-Circuit-Judge Alito confirming two-prong test).

the least intrusive manner.[133] Clearly, this test does not explain what specific facts will constitute a significant gap. The Second Circuit attempted more specificity: if the cell phone service gaps are very limited, such as inside buildings in a low population rural area or limited to few houses, then the "lack of coverage likely will be de minimis" and not be a significant gap that is the equivalent of prohibiting service.[134] The Tenth Circuit, in evaluating facts presented to show a significant gap, determined that a lack of reliable in-building or in-vehicle service and a gap in service along major highways would constitute significant gaps; whereas, "isolated 'dead spots'' in "'a small residential cul-de-sac'" or in-building service "'in a sparsely populated rural area'" would not.[135] Other courts deciding whether there was a significant gap have wanted to know whether cell phone service was "sufficiently poor" and whether the number of affected users was sufficiently large.[136] One city has argued that denial of a permit for facilities to improve in-building cell phone service in an area that already has service is not equivalent to prohibiting wireless service, but a court was not persuaded because the area of weak or no service extended over several blocks.[137] The First Circuit had, perhaps, the longest list of factors to consider in deciding whether a gap was significant: the physical size of the gap, the kind of area in which the gap was located, the number of users affected, whether all the provider's users in the gap area were affected, the percent of calls that were not connected or were dropped.[138] Nevertheless, what size, what number, what percent constitute significance in judging a gap is left to local governments and courts to figure out.

A more specific issue is from whose perspective should a significant gap be considered. Telecom providers have argued that the proper inquiry is whether a particular provider has significant gaps in its cell phone service, whereas local governments have argued that there is no significant gap if residents have adequate access through other providers.[139] Through the first ten years after the Act's passage, different courts took different positions on this issue.[140] In 2009 the FCC answered the question by issuing a declaratory ruling that the Act's prohibits-or-has-the-effect-of-prohibiting-the-provision-of-personal-wireless-services regulation is violated when a local government denies an application to construct telecom facilities on the grounds that other

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[133]*Id.*

[134]*Willoth*, 176 F.3d at 643-44.

[135]AT&T Mobility Serv., LLC V. Vill. of Corrales, No. 15-2069, 2016 WL 873398, at *3 (10th Cir. Mar. 8, 2016).

[136]Liberty Towers, LLC v. Zoning Hearing Bd., No. 10-1666, 2011 WL 3496044, at *13 (E.D. Pa. Aug. 9, 2011) (Lower Makefield, Bucks County, Pennsylvania); New Cingular Wireless PCS, LLC v. Zoning Hearing Bd., No. 06–2932, 2009 WL3127756, at *7 (E.D. Pa. Sept. 29, 2009).

[137]PI Telecom Infrastructure, LLC v. City of Jacksonville, 104 F. Supp. 3d 1321, 1347-48 (M.D. Fla. 2015).

[138]Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 49-50 (1st Cir. 2009).

[139]*See, e.g.*, Liberty Towers, LLC v. Zoning Hearing Bd., Civ. Action No. 10-1666, 2011 WL 3496044, at *8-9 (E.D. Pa. Aug. 9, 2011) (Lower Makefield, Bucks County, Pennsylvania).

[140]*See, e.g.*, *Willoth*, 176 F.3d at 643 ("once an area is sufficiently serviced by a wireless service provider, the right to deny applications becomes broader"); APT Pittsburgh Ltd. P'ship v. Penn Twp., 196 F.3d 469, 480 (3d Cir. 1999) (denial of cell tower permit is effective prohibition only if there is no cell phone service from any provider); AT&T Wireless PCS, Inc. v. City Council, 155 F.3d 423, 428-29 (4th Cir. 1998) (only blanket ban on telecom facilities is effective prohibition); Second Generation Prop., L.P. v. Town of Pelham, 313 F.3d 620, 633-34 (1st Cir. 2002) (significant gap in service if provider in question is prevented from filling significant gap in its own service network); MetroPCS, Inc. v. City & Cty. of San Francisco, 400 F.3d 715, 732 (9th Cir. 2005) (rejecting one-provider approach).

providers are already providing service in the same area.[141] Since then, some courts have concluded that because a goal of the Act is to promote competition, a gap must be evaluated from the provider's position.[142] The United States District Court for the Southern District of New York, citing the First Circuit, concluded that an any-service-equals-no-effective-prohibition rule would not make sense because it would not help the user of AT&T Wireless, for example, who does not have service if a gap is filled by Verizon or Sprint.[143] The Sixth Circuit, in a case of first impression, considered the FCC ruling and the varied approaches of five other circuit courts, and adopted the standards of the FCC and the First and Ninth Circuits, namely that the significant gap refers to a gap in the individual telecom applicant's service.[144] The United States District Court for the Eastern District of Michigan declared the FCC ruling to be determinative on the issue of a significant gap's being assessed based on an individual provider's coverage without consideration of whether other carriers provide service in the gap.[145]

Nevertheless, three years after the FCC ruling, the Fourth Circuit was still interpreting the Act's "effective prohibition" language as meaning one of only three actions: "a 'blanket ban' on wireless service," or "a general policy that essentially guarantees rejection of all wireless facility applications," or "the denial of an application for one particular site is "tantamount" to a general prohibition of service."[146] This definition of the Act's prohibition is clearly looking at the prohibition from the position of the user, not of the provider.

In 1999, the Third Circuit adopted a user rule, that is, considering a gap significant only if an area is not served by any cell phone provider.[147] The court confirmed its adoption of the user rule in 2002.[148] After the 2009 FCC ruling, district courts in the Third Circuit were left with a predicament as to whether they should be following the Third Circuit's user rule or the FCC provider rule. The United States District Court for the Middle District of Pennsylvania has noted that there is an issue of whether deference should be given to the FCC ruling, but found it unnecessary to discuss the issue because of the facts of its case.[149] On the other hand, the United States District Court for the Eastern District of Pennsylvania acknowledged the split between the

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[141]. FCC Declaratory Ruling to Clarify Provisions of Section 332(C)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, 24 F.C.C.R. 13994, 14015 (Nov. 18, 2009).

[142]*See e.g.,* Omnipoint Holdings, Inc. v. City of Cranston, 586 F.3d 38, 49, 51 (1st Cir. 2009) (concluding that significant gap means within individual carrier's system because Act's goal is to encourage competition); MetroPCS New York, LLC v. Vill. of East Hills, 764 F. Supp. 2d 441, 455 (E.D.N.Y. 2011) (without citing 2009 FCC Ruling).

[143]T-Mobile Northeast LLC v. Town of Ramapo, 701 F. Supp. 2d 446, 458(S.D.N.Y. 2009) (Citing Second Generation Prop., L.P. v. Town of Pelham, 313 F.3d 620 (1st Cir. 2002)).

[144]T-Mobile Central, LLC v. Charter Township, 691 F.3d 794, 807 (6th Cir. 2012).

[145]T-Mobile Central LLC v. City of Fraser, 675 F. Supp. 2d 721, 729 (E.D. Mich. 2009).

[146]T-Mobile Northeast, LLC v. Fairfax Cty., 672 F.3d 259, 266 (4th Cir. 2012). The Fourth Circuit has been consistent in taking a "user" approach. In 1998, it held that in order to preserve local authority, the Act should be interpreted as prohibiting only a blanket ban on cell phone facilities. AT&T Wireless PCS, Inc. v. City Council, 155 F.3d 423, 429 (4th Cir. 1998). In 2003, the court recognized that without a blanket ban, theoretically, the denial of a permit could be an effective prohibition of service if the location in the application was the only one that would provide the required coverage. USCOC of Va. RSA #3, Inc. v. Montgomery Cty. Bd. of Supervisors, 343 F.3d 262, 268 (4th Cir. 2003). But the court thought that "scenario 'seems unlikely in the real world.'" *Id.*

[147]APT Pittsburgh Ltd. P'ship v. Penn Twp., 196 F.3d 469, 480 (3d Cir. 1999).

[148]Nextel West Corp. v. Unity Twp., 282 F.3d 257, 265 (3d Cir. 2002).

[149]Nextel Commc'n of the Mid-Atlantic, Inc. v. Zoning Hearing Bd., No. 3:14-CV-2409, 2016 WL 1271385, at *4 (M.D. Pa. Mar. 31, 2016).

Third Circuit and the FCC and decided that "under well-established principles of administrative law, the FCC's Declaratory Ruling is entitled to deference from the federal courts."[150] Similarly, the United States District Court for the District of New Jersey acknowledged the Third Circuit's user rule, recognized that other circuits rejected the user rule, and concluded that it had to follow the FCC's provider rule interpretation of the Act.[151]

Unfortunately, with more than twenty years of experience under the Act, some courts are still concluding that "'[s]ignificant gap determinations are extremely fact-specific inquiries that defy any bright-line legal rule.'"[152] Given that problem, courts are sometimes aided by scientific tools that can clarify what the facts are. Two tools that the telecom industry uses to demonstrate the inadequacy of existing signals are radio frequency propagation maps and drive tests.[153] Propagation maps are computer models that predict signal strength within a geographic area covered by the proposed cell tower.[154] Drive tests are empirical studies conducted by driving a vehicle outfitted with sensitive radio frequency scanning and global positioning equipment that records actual signal strength in an area.[155] These tools which are widely used by the industry help telecom companies make the case that there is a significant gap in cell phone service. Recently, even a local zoning hearing board in Pennsylvania used a propagation study to support its denial of a tower siting permit when there were alternate sites more to the liking of residents.[156] Furthermore, the board successfully argued that the telecom company's propagation study was inconsistent with its drive test results and, therefore, it was unreliable, creating the substantial evidence the board needed to support its permit denial.[157]

C. Recent Cases

With twenty plus years of litigation deciding "substantial evidence" and "significant gap" questions, one might think that courts or Congress or the FCC would have supplied the answers so that local governments could avoid lawsuits when they deny a permit for a cell phone tower, but that is obviously not the case. In the twentieth year and going forward after the Act's passage, the litigation continues. In many of the cases the outcome seems predictable and litigation avoidable.

The majority of recent cases have been decided in favor of the telecom companies. For example, in *Orange County-County of Poughkeepsie Limited Partnership v. Town of East Fishkill*,[158] the Second Circuit held that the town's denial of Verizon's application to construct a

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[150]Liberty Towers LLC v. Zoning Hearing Bd., 748 F. Supp. 2d 437, 444 (E.D. Pa. 2010).

[151]Sprint Spectrum L.P. v. Zoning Bd., No. 09-4940 (JLL), 2010 WL 4868218, at *9 (D.N.J. 2010) (marked "not for publication').

[152]Stout & Co., LLC v. City of Bel Aire, No. 2:15-cv-09323-JTM, 2016 WL 3759440, at *11 (D. Kan. July 14, 2016) (citing T-Mobile Central, LLCv. Unified Gov't, 528 F. Supp. 2d 1128, 1165 (D. Kan. 2007) (Wyandotte County/Kansas City, Kansas); AT&T Mobility Serv., LLC v. Vill. of Corrales, No. 15-2069, 2016 WL 873398, at *2 (10th Cir. Mar. 8, 2016).

[153]*Vill. of Corrales*, 2016 WL 873398, at *5 n. 3.

[154]*Id.*

[155]*Id.*

[156]*See, e.g.*, Nextel Commc'n of the Mid-Atlantic, Inc. v. Zoning Hearing Bd., No. 3:14-CV-2409, 2016 WL 1271385, at *2 (M.D. Pa. Mar. 31, 2016).

[157]*Id.* at *6.

[158]632 Fed. Appx. 1 (2d Cir. 2015).

150-foot monopole[159] was an effective prohibition of wireless services in violation of the Act.[160] Verizon claimed it needed the monopole to close a significant gap in cell phone service.[161] The court said deciding whether a gap is significant "is a 'fact-bound' question that requires a case-by-case determination."[162] The court concluded that evidence showed that the gap affected about 35,000 people everyday, a significant gap.[163] Verizon investigated alternate sites and concluded that none would remedy the existing gap.[164] It took four years from the time Verizon submitted its application for the permit[165] until the Second Circuit rendered its verdict.[166] It would seem that if Verizon had spent time and resources in good faith, before even applying for a permit, to explain the legal and technical facts to the town and its residents, litigation might have been avoided, serving the interests of all parties.

In *Vantage Tower Group, LLC v. Chatham County-Savannah Metropolitan Planning Commission*[167] Vantage submitted an application for a variance to build a 127-foot cell tower where the City of Savannah prohibits towers taller than eighty-five feet.[168] The city council denied the request for the variance in a letter that did not give any reasons for the decision.[169] The United States District Court for the Southern District of Georgia held that the city violated the Act by not providing any reasons for its decision.[170] The Act does not provide a remedy when its provisions have been violated, but in most similar cases, courts have ordered the government to approve the permit.[171] This court decided that the city acted in good faith and so remanded Vantage's request back to the city "hop[ing]" that this time the city would give "a list of detailed reasons" for its decision.[172] One has to conclude that this situation is a great waste of resources for the telecom company, the city, the court, and ultimately ratepayers and taxpayers. Delay is a strategy but, in the case of cell towers, it does not serve the public interest. The city should have done it right the first time.

NE Colorado Cellular, Inc.v. City of North Platte[173] is another case that makes one wonder about the legal advice the city was getting or if its officials were just acting to win favor among their residents who are their voters. Viaero Wireless applied for a permit to erect a 100-foot cell tower.[174] The city denied the permit on the grounds that the tower would not be in compliance with the city code because it "was not 'in harmony with the character of the area.'"[175] The court concluded that the denial was not based on substantial evidence and ordered the city to grant the

[159]Orange Cty.-Cty. of Poughkeepsie L't'd P'ship v. Town of E. Fishkill, 84 F. Supp. 3d 274, 278 (S.D.N.Y. 2015).
[160]632 Fed. Appx., at *4.
[161]*Id.* at *2.
[162]*Id.*
[163]*Id.* at *3.
[164]*Id.*
[165]*Orange Cty.*, 84 F. Supp. 3d at 279 (application submitted on Nov. 28, 2011).
[166]*Orange Cty.*, 632 Fed. Appx.
[167]No. 4:13-cv-258, 2015 WL 300257 (S.D. Ga. Jan. 20, 2015).
[168]*Id.* at *1.
[169]*Id.* at *3-*4.
[170]*Id.* at *4.
[171]*Id.*
[172]*Id.* at *5.
[173]No. 4"14-CV-3088, 2015 WL 351396 (D. Neb. June 4, 2015).
[174]*Id.* at *2.
[175]*Id.* at *3.

permit "without undue delay or obstacle . . . not later than 10 days."[176] Generally, the "not in harmony" reasoning is successful when the proposed tower is in a residential area and is viewable from many homes or blocks residents' view of a scenic landscape. In this case the proposed site was the parking lot for a bar and tobacco shop.[177] The surrounding property was zoned light industrial or highway commercial and included an auto repair shop, a lot with stored Army Reserve vehicles, and warehouses.[178] Although there were a few residences in the area, one complaining resident admitted that her house was an "oasis" in a commercial area.[179]

There was the same result in a case with similar facts decided by the United States District Court for the Southern District of Alabama in July of 2016: no substantial evidence to support the city's reasons for denying a permit for a cell tower in an area zoned for community business districts.[180] The city cited safety concerns including dangers from hazardous materials and storms but provided no evidence that the concerns were realistic.[181] Residents also had aesthetic concerns, but protests about the impact on views were not supported with photographs or any other substantial evidence; their complaints were "generalized" not specifically about the tower and area at issue.[182]

Telecom companies have lost only a few tower-siting cases in the last two years, one seemingly caused by the company's sloppy work, another because the Board of Supervisors of Fairfax County, Virginia did its job well. In the former, *Nextel Communications of the Mid-Atlantic, Inc. v. Zoning Hearing Board*,[183] Nextel was not in compliance with the local zoning ordinance because it did not make a good faith effort for its proposed tower to provide cell phone service by the least intrusive means.[184] Nextel did not contact the FCC or other companies to get any information about co-location which would have been preferable to the community.[185] In order to show that its proposed tower would eliminate a significant gap, Nextel provided a propagation study and a drive test report, but the results of the two were inconsistent so the zoning board found the information unreliable, substantial evidence on which to base its denial of a permit.[186]

In *Cellco Partnership v. Board of Supervisors*[187] Verizon applied to the Fairfax County Board of Supervisors to construct a 140-foot cell tower to remedy a service gap.[188] The board's main objection was the adverse visual impact on the local residential community and historical

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[176]*Id.* at *4, *8.

[177]*Id.* at *4.

[178]*Id.*

[179]*Id.* at *6.

[180]Cellular South Real Estate, Inc. v. City of Mobile, No. 15-00387-CG-B, 2016 WL 3746661 (S.D. Ala. July 8, 2016).

[181]*Id.* at *6.

[182]*Id.* at *8. *See also* Cellular South Real Estate, Inc. v. City of Germantown, No. 2:12-cv-02888-JPM-tmp, 2015 WL 3852781 (W.D. Tenn. June 22, 2015) (no objective evidence of aesthetic impact of tower on neighborhood other than "isolated rendering" of tower); Verizon Wireless of the East. L.P. v. Columbia Cty., No. CV 114-211, 2015 WL 1877452 (S.D. Ga. Apr. 23, 2015) (no substantial evidence that tower posed safety risk in face of unrefuted expert reports).

[183]No. 3:14-CV-2409, 2016 WL 1271385 (M.D. Pa. Mar. 31, 2016)

[184]*Id.* at *4-*5.

[185]*Id.* at *5.

[186]*Id.* at *6-*7.

[187]140 F. Supp. 3d 548 (E.D. Va. 2015).

[188]*Id.* at 554-55.

sites.[189] The county's Comprehensive Plan requires new facilities to be designed so their visual presence is "consistent with the character of the surrounding area.[190] The board concluded that Verizon's proposed tower would not be harmonious with its neighborhood and offered substantial evidence for its conclusion: pictures and photo simulations based on a balloon fly test demonstrating that the tower would be visible from twenty-two local residences; pictures demonstrating that the tower would be at least four times the height of local homes and at least twice the height of nearby trees; testimony that proposed plantings would take ten years to grow to less than a quarter of the tower's height; testimony from a local realtor that the tower would lower home prices; specific evidence from numerous residents.[191] The court acknowledged the testimony of Verizon's experts about the need for the tower, but noted that "the views of the community 'will often trump those of . . . experts in the minds of reasonable legislators.'"[192] The court concluded that the board had a large amount of evidence indicating that the proposed tower was inconsistent with the county's Comprehensive Plan, and those inconsistencies provided substantial evidence supporting the board's decision to deny Verizon's application.[193] Supporting the board's position was the fact that it had approved 550 applications for wireless facilities, eighty-seven of them for Verizon, so there was no reason for the court to think that the board was opposed to every facility.[194]

III. Solutions

Early on, the Second Circuit said it did not "read the [Act] to allow the goals of increased competition and rapid deployment of new technology to trump all other important considerations, including the preservation of the autonomy of states and municipalities."[195] The Act's basic notion was to allow local zoning authorities to maintain their control over their territories with a few new limitations that would encourage cell phone service companies to provide access to everyone. With hindsight this arrangement still seems like a good idea. Some commentators have approved the Act as a cooperative model balancing the interests of local governments with federal objectives.[196] The problems are the strong competing interests involved and the lack of specific definitions for the limitations. It would have been difficult to anticipate the specific differences of opinion that have arisen, but once they did, members of Congress should have amended the statute to deal with the problems that exist and the changes in technology in the last twenty years. With twenty years of experience, the Act should no longer be a "make-work-for-attorneys" act. However, with so much litigation from which to learn, all interested parties should be able to do better at avoiding it.

Residents of the Town of Ramapo in New York should have been incensed that twelve years after the Act's passage, its planning board gave health risks as a significant reason for denying T-

[189] *Id.* at 557.
[190] *Id.* at 565.
[191] *Id.* at 568-70.
[192] *Id.* at 576.
[193] *Id.* at 571.
[194] *Id.* at 586.
[195] Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630, 639 (2d Cir. 1999).
[196] *See, e.g.*, Adam J. MacLeod, *Identifying Values in Land Use Regulations*, 101 KY. L.J. 55, 84-85, 111-12 (2012-13); Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. LEGIS. 289, 319 (2011).

Mobile's application to construct a cell phone tower within the town, even though the board knew that health concerns are an illegitimate ground for a denial.[197] The cases indicate that local governments must read the statute and understand its limitations; must have local zoning laws that list all the factors that will be considered in deciding whether or not to approve an application to erect a cell tower and those factors may not be an absolute or a de facto ban on cell towers; must cite the local zoning laws when denying an application to erect a cell tower; and must support denials with specific evidence, not generalized complaints, that may include testimony by local real estate salespersons or appraisers; testimony by local residents that names specific negative effects of the specific tower at issue; academic articles; and testimony by experts about radio frequency tests or drive-by tests or balloon demonstrations.

For their part, residents who oppose a cell tower must also do their homework so they understand the statute and the kinds of evidence that will support their claims. In particular, they have to understand not to make claims about health concerns and not to make generalized claims about cell towers. Their opposition must be based on specific complaints about their situation vis-a-vis the tower that has been proposed. Their complaints must be supported by evidence that may include photographs of the existing residential area, photographs of balloon tests, local realtor testimony about lost sales and lower prices because of the threat of the proposed tower, maps of local commercial areas better suited to accommodating a cell tower.

Although telecom companies are well prepared with strategies and teams of legal and technical experts, they would save time and money if they did not have to litigate after a permit denial. It would be in their interest to help educate town boards and residents about the Act and to hold meetings about potential sites before submitting permit applications. Commentators in the field of conflict resolution have developed "The Mutual Gains Framework" for "dealing with an angry public."[198] The framework has six principles:

1. Acknowledge the concerns of the other side
2. Encourage joint fact finding
3. Offer contingent commitments to minimize impacts if they do occur; promise to compensate unintended effects
4. Accept responsibility; admit mistakes, and share power
5. Act in a trustworthy fashion at all times
6. Focus on building long-term relationships[199]

The framework seems particularly well-suited to the conflict between telecom companies and local residents when the issue is a cell tower. Residents want seamless cell phone service, and federal law will not allow them to keep cell phone facilities out of their towns. So they have an interest in working with a telecom company as long as they believe they are being consulted, their input is taken seriously, and a few will not have to bear the burden alone so everyone can have adequate cell phone service. The creators of the framework have said they have seen positive results in many cases in which the principles were used along with other conflict resolution tools and techniques, but they admit that they have not seen substantial changes in government or corporate

[197]T-Mobile Northeast LLC v. Town of Ramapo, 701 F. Supp. 2d 446, 461(S.D.N.Y. 2009).

[198]Lawrence Suskind & Patrick Field, *Dealing with an Angrier Public*, Q. MAG. OF THE ASS'N FOR CONFLICT RESOL., July 2012, *available at* www.cbuilding.org/publication/article/2012/dealing-angrier-public.

[199]*Id.*

behavior.[200] If telecom companies gave this method a chance, they might find they could save considerable time and money.[201]

[200] *Id.*

[201] *See* Merrick Hoben et al., *Downed Lines: Best Practice for Improving Wireless Telecommunications Disputes*, RIGHT OF WAY, Nov./Dec. 2006.